OpTel SM
The choice is clear.

EX PARTE

July 17, 1998

Ms. Helgi Walker
Office of Commissioner Furchtgott-Roth
Federal Communications Commission
1919 M Street NW
Washington, D.C. 20554

Re: CS Docket No. 95-184

Dear Helgi:

I wanted to get back to you quickly on your question regarding the authority of the Commission to apply its "fresh look" policy to cable perpetual contracts. Although we agree that the Commission should normally avoid regulating private contractual relationships, when, as in the case of cable perpetual contracts, there has been a clear market failure and incumbent providers are using perpetual contracts to extend and perpetuate monopolies, we believe that it is altogether fitting and proper for the Commission to prohibit such anticompetitive behavior and to proscribe such contracts.

The Commission previously has imposed "fresh look" obligations on dominant providers to prevent them from using their market power in anticompetitive ways.[1] "Fresh look" allows customers committed to long-term contracts with an entrenched monopolist to take a fresh look at the marketplace once competition is introduced and to escape those contracts if they so desire with little or no termination liability. This approach "makes it easier for an incumbent provider's established customers to consider taking service from a new entrant.... [and] obtain...the benefits of the new, more competitive...environment."[2]

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[1] See Competition in the Interstate Interexchange Marketplace, 7 FCC Rcd 2677, 2678 (1992); Expanded Interconnection with Local Tel. Co. Facilities, 8 FCC Rcd 7341, 7342-43 (1993), vacated on other grounds, Bell Atlantic Tel. Co. v. FCC, 24 F.3d 1441 (1994).

[2] Expanded Interconnection with Local Tel. Co. Facilities, 9 FCC Rcd 5154, 5207 (1994).

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The Commission has ample authority to apply its "fresh look" policy in this context. In the early days of cable television, cable operators were coercing communities into perpetual franchises and cable television service was "tend[ing] to develop on a noncompetitive, monopolistic basis in the areas served."[3] The Commission concluded that perpetual and "extremely long (i.e. 99-year) franchises .... are an invitation to obsolescence."[4] Thus, based on its authority under Sections 2 and 4(i) of the Communications Act, the Commission responded to this market failure by requiring franchising authorities to place a "reasonable limit" of fifteen years on the duration of cable franchises.[5]

The situation with regard to MDU perpetual contracts is analogous. Unless cable customers are permitted to escape contracts of unlimited duration that were executed at a time before competitive alternatives became available in the market, subscribers in these MDUs will forever be at the mercy of the franchised cable operators. This result would be inconsistent with the Commission's responsibility to see that all the people of the United States have available "rapid, efficient ... wire and radio communication service with adequate facilities at reasonable charges."[6]

Since the time of the 1972 franchise term limits, the Commission has been given additional authority to regulate cable services under Title VI. The Commission now is required to ensure that the rates charged to subscribers by cable systems not subject to effective competition are reasonable.[7] In addition, the Commission has been given oversight responsibilities with regard to local franchising under Section 621.[8] Thus, under Section 4(i), which grants the Commission "authority reasonably ancillary to the effective performance of [these] responsibilities,"[9] the Commission may impose "fresh look" obligations on franchised cable operators.

Finally, application of the "fresh look" policy to the perpetual service contracts of franchised cable operators would help the Commission to fulfill its obligations under Section 257 of the Communications Act, added by the Telecommunications Act of 1996, which requires that the Commission identify and eliminate market entry barriers for entrepreneurs and small businesses.[10] Only by

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3 In re Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems, 36 F.C.C.2d 143, 145 (1972).

4 In re Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems, 46 F.C.C.2d 175, 195 (1974).

5 36 F.C.C.2d at 207-211, recon., 36 F.C.C.2d 326, 365 (1972).

6 47 U.S.C. § 151.

7 47 U.S.C. § 543(b).

8 47 U.S.C. § 541.

9 U.S. v. Southwestern Cable Co., 392 U.S. 157, 178 (1968).

10 47 U.S.C. § 257(a).

opening up the perpetual service contracts of the franchised cable operators will new entrants into the MVPD market have an opportunity to compete.

With respect to your concerns about the application of the Contract Clause to these issues,[11] I went back and verified that the Contracts Clause applies only to the several states; it does not affect the FCC's authority to impose fresh look obligations. Further, although the Due Process Clause of the Fifth Amendment does limit in some respects the federal government's ability to enact retroactive legislation, the federal government has substantially more latitude to impair private contracts under the principles of the Due Process Clause than the states do under the Contract Clause.[12] In essence, the federal action need only be rationally related to some legitimate government purpose.

Once again, thank you for your time, and I hope that we have future opportunities to discuss these and other issues.

Sincerely,

Mike Katzenstein
Vice-President/General Counsel
OpTel, Inc.

cc: Magalie R. Salas, Secretary

[11] U.S. Const. art. I, § 10.

[12] See Pension Benefit Guaranty Corp. v. R. A. Gray and Co., 467 U.S. 717, 734 (1984).